

The Frances

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SooperKanoon Citation : sooperkanoon.com/78674

Court : US Supreme Court

Decided On : 1815

Appeal No. : 13 U.S. 183

Appellant : The Frances

Judgement :

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SYLLABUS

If a British merchant purchase, with his own funds, two cargoes of goods in consequence of but not in exact conformity with the orders of an American house, and ship them to America, giving the American house an option within twenty four hours after receipt of his letter to take or reject both cargoes, and if they give notice within the time that they will take one cargo but will consider as to the other, this puts it in the power of the British merchant either to cast the whole upon the American house or to resume the property and make them accountable for that which came to their hands. The right of property in the cargo not accepted does

not, *in transitu*, vest in the American house, but remains in the British subject, and is liable to condemnation, he being an enemy.

In the ordinary course of mercantile transactions, a delivery to a ship master is a delivery to a consignee, but this delivery may be absolute or qualified, and the effect of it may vary accordingly. A voluntary agent has the option to enter upon his agency in strict conformity with the instructions of his principal or with such reservations or conditions as he may think proper to prescribe, and the only consequence it that in the latter case he leaves his principal at liberty to adopt or repudiate his acts.

The shipper who purchases goods on his own credit or with his own funds is not acting in the ordinary capacity of a factor. If he were, the goods, even before shipment, would be the property of the individual on whose order the purchase is made. Such shipments are in the nature of a mercantile credit, and the shipper always retains the uncontrolled exercise of discretion in extending it.

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In this case further proof was ordered at the last term.

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JOHNSON, J. delivered the opinion of the Court as follows:

This claim is interposed to obtain restitution of three bales and nineteen boxes of goods captured in the *Frances*. As early as 23 July, 1811, these claimants, anticipating a repeal of the orders in council, give an order to Alexander Thompson of Glasgow to ship them a variety of articles. In July, 1812, upon the repeal of the orders in council, Thompson ships the articles ordered, and, originally intending to ship to

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the claimants a consignment on his own account, intermingles with the goods ordered a variety of others not contained in the order of the claimants. These goods are shipped by two vessels, the *Fanny* and the *Frances*, and by a letter dated 11f July, 1812, Thompson advises the claimants of these shipments; and, after descanting on the merits of the articles and declaring his reason for blending other goods with those shipped to their order, and his subsequent determination to make them an offer of the additional goods, he continues in these words:

"I leave it with yourselves to take the whole of the two shipments or none at all, just as you please. If you do not wish them, I will thank you to hand the invoices and letters over to Messrs. Falconer, Jackson & Co. I think twenty-four hours will allow you ample opportunity for you to make up your minds on this point, and if you do not band them over within that time, I will, of course, consider that you take the whole. . . . You will see, I think, the reasonableness of your taking the whole or none of the shipment."

The *Fanny* reached the waters of the United States in safety, and, being seized by a revenue cutter, was carried into New London, where she has been finally restored. The *Frances* was captured on 28 August by the privateer *Yankee* and carried into Rhode Island. On 22 August, after the arrival of the *Fanny*, the claimants write to Falconer, Jackson & Co. and accept of the shipment by the *Fanny*, but with regard to that by the *Frances* they write in the following words: "His letter also speaks of another shipment of thirty-one packages per *Frances* which on arrival we shall then hand in our determination." On the first of September following, they again write to Falconer, Jackson & Co., intimating their acceptance of the shipment by the *Frances*.

On this state of facts it is contended that the claimants are entitled to restitution -- that they either had an original interest in the goods shipped or had acquired one before the capture.

In the ordinary course of mercantile transactions, a delivery to a ship master is a delivery to the consignee.

But it is evident that this delivery may be absolute or qualified, and that the effect of it must vary accordingly. A voluntary agent has the option either to enter upon his agency in strict conformity with the instructions of his principal or with such reservations or conditions as he may think proper to prescribe, and the only consequence is that in the latter case, he leaves his principal at liberty to adopt or repudiate his acts. The shipper who purchases goods on his own credit or with his own funds is not acting in the ordinary capacity of a factor. If he were, the goods, even before shipment, would be the property of the individual on whose order the purchase is made. Such shipments are in the nature of a mercantile credit, and the shipper always retains the uncontrolled exercise of discretion in extending it. There was therefore nothing inconsistent with the relative rights of the parties in Thompson's imposing upon the consignees the condition of taking all or none of the two shipments, and the consequence was that the delivery was not absolute, but qualified, and until the condition performed, the goods remained the property of the shipper, and had they suffered shipwreck, the loss would have been his.

But it is contended that the condition was performed and that this case forms an exception from the rule that, as to the exercise of belligerent rights, there shall be no transfer *in transitu*.

The acceptance of the cargo by the *Fanny* was on 22, the capture of the *Frances* on 28 August. It is contended that the acceptance of the *Fanny's* cargo was conclusive as to both shipments and that, although partial in terms, it must in law have effect as to the whole, since such was the condition imposed by the shipper, and that it was in fact the intention of the claimants that such should be the effect of the acceptance; but the reservation was intended only as a *ruse de guerre* to guard against the effects of hostile capture.

There is certainly nothing illegal in resorting to devices to elude hostile capture, and where it can be clearly shown the property is really neutral or friendly, its being covered under hostile habiliments for the purpose

of evasion will not necessarily subject it to condemnation. But the evidence must be less equivocal than that relied on in this case. The property was already captured and libeled as liable to American capture when the claimants' letter of 19 September was written. To receive such evidence under such circumstances to so critical a point would be to surrender every belligerent right to fraud and imposition. The letter of 22 August must therefore be taken on its plain import, and such effect given to it as its words imply.

This letter contains an express exclusion of the goods under consideration, but it is contended that, as Thompson's letter left them no latitude, but obliged them either to choose or refuse the whole, their acceptance of part cast on them the property in the whole.

But we are of opinion that such was not the effect of this act of the claimants. The consequence of such a doctrine would be that where a property is to be acquired upon a condition performed, the condition may be rejected and yet the property acquired. It certainly put it in the power of the shippers either to cast the whole property upon the claimants or resume the property, and make the consignee accountable for that which had come to his hands. Falconer, Jackson & Co., upon the arrival of the *Frances*, had she not been captured, would have had an undoubted right to demand the shipment made by her on the ground of the claimants' not having accepted it within the time limited, and it would have been in vain for the claimants to have contested their right whilst they held the letter of 22 August and Thompson's instructions on the subject of the acceptance. If, then, it rested with Thompson or his agent to retain the property in this shipment or cast it upon the claimants, the consequence is that the legal interest still remained in the shippers.

This conclusion on the state of interest in the parties renders it unnecessary to consider the argument urged to except this case from the rule relative to changes of property *in transitu*, and we hope it will be at all times recollected that the reasoning in this case is not founded on the implied admission of the distinction

taken by the claimants' counsel on this subject.

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